IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1142

In the matter of the APPLICATION OF CHERYL SPIDER DECOTEAU, natural mother and next friend and on behalf of ROBERT LEE FEATHER and HERBERT JOHN SPIDER for a WRIT OF HABEAS CORPUS, Petitioner,

v.

THE DISTRICT COUNTY COURT FOR THE TENTH JUDICIAL DISTRICT, Respondent.

MEMORANDUM FOR RESPONDENT'S CONCURRENCE THAT CERTIORARI BE GRANTED

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No. 73-1148

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Respondent adopts, for the purposes of this memorandum, the material in the Petition under the headings "Opinions Below," "Jurisdiction" and "Statutes Involved."

QUESTION PRESENTED

WHETHER OR NOT THE ACT OF MARCH 3, 1891, AMENDING AND RATIFYING AN 1889 AGREEMENT FOR THE OUTRIGHT CESSION AND SALE OF ALL THE UNALLOTTED LANDS OF THE LAKE TRAVERSIE RESERVATION TO THE UNITED STATES GOVERNMENT FOR A SUM CERTAIN, DISESTABLISHED SAID RESERVATION AND RESTORED SAID LANDS TO THE PUBLIC DOMAIN.

STATEMENT OF THE CASE

The facts of the case are stated fully in the decisions of the Circuit Court for the Fifth Judicial Circuit of South Dakota (Petitioner's Appendix in B, at 7a-11a) and the Supreme Court of South Dakota (Petitioner's Appendix A, at 1a-7a).

ARGUMENT

I. THE DECISIOINS BELOW ARE PLAINLY CORRECT.

The Supreme Court of the State of South Dakota is completely aware of the decisions of the Eighth Circuit Court of Appeals and this Court construing acts similar to the Act of March 3, 1891. In numerous instances it has cited and analyzed each and every decision cited by Petitioner, including **Mattz** v. **Arnett** 93 S.Ct. 2245 (1973). For example, as recently as 1972, the court felt compelled to hold that boundaries of the Standing Rock Reservation were unaffected by the passage of legislation similar to the legislation construed in **Seymour** v. **Superintendent,** 368 U.S. 351, because of the broad application recently given **Seymour** by the Eighth Circuit Court of Appeals. **State of South Dakota** v. **Molash,** 199 N.W.2d 591 (S.D. 1927)

However, in the instant case the court could not agree with the rationale of either the recent Eighth Circuit decisions or the two leading decisions from this Court. Therefore, it found that the lands affected by the 1891 Act were restored to the public domain and that the Lake Traverse Reservation had been effectively disestablished. This finding is wholly consistent with the legislative history and peripheral materials available concerning the effect Congress intended the 1891 Act to have on the Lake Traverse Reservation.

Secondly, having found the Lake Traverse Reservation to have been disestablished by the 1891 Act, the decision of the Supreme Court of South Dakota is not, as petitioner states,

"irreconcilable with, and a misconstruction of 18 U.S.C. 1151 which defines Indian Country as including 'all lands within the limits of any Indian reservation . . . . notwithstanding the issuance of any patent.' " Petition at 7. The court found the reservation was disestablished by the 1891 Act and therefore that portion of 18 U.S.C. 1151 cited by Petitioner would not be applicable as none of the land in question would be "within" the limits of any reservation.[1]

As recently as 1963, the Eighth Circuit Court of Appeals agreed with this analysis. **DeMarrias v. State of South Da kota,** 319 F 2d 845 (1963).[2] However, in December of 1973, the Eighth Circuit Court of Appeals expressly overruled the **DeMarrias** decision and held that the Lake Traverse Reservation had not been disestablished by the 1891 Act and for all practical purposes thereby overruled the State Supreme Court in the instant case. **United States ex rel. Feather v. Erickson,** —F.2d—(CA 8 December 7, 1973). In the **Feather** decision the court relied heavily on the rationale of the **Seymour** and **Mattz** decisions and its other recent decisions, a point which will be discussed at II, infra.

Since the **Feather** decision, the state has devoted considerably more time and effort to researching the question presented. This research, most of which unfortunately was not presented to either the Eighth Circuit Court of Appeals or the South Dakota Supreme Court, convinces your

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1. If the reservation was in fact disestablished, the remaining **trust** land would, of course, fall within the definition of Indian Country set forth at 18 U.S.C. 1151(c). Even so, Respondent is not fully cognizant of to what extent, if any, a **criminal** statutory definition of Indian Country would then be applicable in determining the **civil** jurisdiction of the state.

2. The Act of March 3, 1891, has had a long prior history of judicial interpretation, none of which is consistent with the conclusion reached by the Court of Appeals in **Feather. Application of DeMarrias,** 107 N.W.2d 480 (S.D. 1958). **State v. DeMarrias,** 107 N.W. 2d 255 (S.D. 1961), cert. denied, 368 U.S. 844 (1961). DeMarrias v. State of South Dakota, 206 F.Supp. 549 (D.S.D. 1962), and the 1963 **DeMarrias** deceision cited above in the text of the memorandum.

Respondent that the decision of the latter court was correct in holding that Congress intended the 1891 Act to restore all the unallotted land to the public domain and thereby disestablish the Lake Traverse Reservation—and Congress, in **this** case, was acting in accordance with the wishes of the Indians.

The Indians wanted to sell their reservation[3] and the Department of the Interior instructed the office of Indian Affairs to negotiate "for the relinquishment of such portions of the Lake Traverse Reservation" as the Indians wanted "to release." Letter from T. J. Morgan, Commissioner of Indian Affairs to the Negotiation Commission, August 13, 1889.

In **this** case, it was to be an agreement for "the cession or relinquishment of the reservation,". Letter, supra at 2, —an agreement for the outright cession and sale of the reservation by the Indians to the Government restoring the land to the public domain, notwithstanding the statement in **Feather,** that "the reservation here was not sold to the government outright but merely opened for settlement under the homestead laws . . . . **Feather, supra** at 4.

Furthermore, immedately after the passage of the act, the Lake Traverse Reservation was removed, completely and unequivocally, from the official government maps and tables recording the then existing Indian Land areas and reservations in the United States. Consistent therewith, the unambiguous phrase "former Lake Traverse Reservation" begins to appear in the official communications of the Department of

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3. Gabriel Renville, who was the chosen leader on the Lake Traverse Reservation at the time, expressed the view that ". . . We never thought to keep this reservation for our lifetime . . . ." Other similar remarks were expressed in terms of the benefits of the sale, ". . . . We don't expect to keep reservation. We want to get the benefit of the sale . . ." National Archives File #26-63-1889, SC 147 Sisseton.

the Interior and Office of Indian Affairs, in addition to other miscellaneous congressional correspondence.

In this light, the fact that there was not any discussion of reservation boundaries in the documents examined by the Court of Appeals and therefore stressed in **Feather** opinion as in some way indicating the continued existence of the Lake Traverse Reservation, becomes somewhat of an anomaly. Boundaries of a reservation which were to be disestablished would seem to this Respondent to be somewhat unnecessary. Presumably, the government agreed.

Respondent's election not to file a brief in opposition in the instant case should not, therefore, be in any manner considered to reflect on the validity of the decision in the court below. In the event a writ is granted, the above and other materials in support of the decision will be presented in detail to this Court.

II. WITHIN THE PAST SIX MONTHS A SUBSTANTIAL CONFLICT HAS BECOME APPARENT WITHIN THE EIGHTH CIRCUIT, AND BETWEEN THE EIGHTH CIRCUIT COURT OF APPEALS AND TH SOUTH DAKOTA SUPREME COURT.

The wholesale application of the **Seymour, supra,** and **Mattz, supra,** rationale by the Eighth Circuit Court of Appeals to each and every piece of reservation legislation that even resembles the acts construed therein has resulted in what the South Dakota Supreme Court has aptly termed "confusion." **Cook v. State of South Dakota,** (Filed March 15, 1974, S.D.)

This "confusion" can be best illustrated by a brief review of the decisions commencing with the opinion of the Eighth Circuit Court of Appeals in **The City of New Town, North Dakota** v. **United States,** 454 F.2d 121 (CA8 1972). In

New Town, the Court of Appeals held that the boundaries of the Fort Berthold Reservation were not diminished by legislation that had for over fifty years been considered to have diminished the reservation. The Court based its decision on the rationale of the **Seymour** case. Six months later, the South Dakota Supreme Court, in construing similar legislation affecting a South Dakota reservation, reluctantly bowed to the Eighth Circuit Court of Appeals and overruled nearly fifty years of state case law in **State** v. **Molash**, 199 N.W.2d 591 (S.D. 1972). The concurring opinion of Chief Justice Biegelmier suggested that it might be "in the public interest" for the State Attorney General to file a petition for Certiorari and Judge Doyle concurred in the suggestion. **Molash, supra,** at 594.

At approximately the same time, the Federal District Court for the District of South Dakota construing another "similar" piece of legislation, which was before it on remand by the Eighth Circuit Court of Appeals for further consideration of the issue in light of **New Town,** supra, held that the boundaries of the Cheyenne River Reservation were not diminished. **United States ex rel Condon** v. **Erickson,** 344 F. Supp. 777 (D.S.D., 1972).

This decision touched off a debate in the South Dakota Law Review concerning the rather conspicuous absence, in the opinion and in the briefs, of any substantial citations to legislative history. 18 S.Dak. L. Rev. 85 (1973). The debate, however, was not in time to affect the Eighth Circuit Court of Appeals decision in **Condon** holding that the Cheyenne River Reservation was not diminished even though the legislation being construed therein referred **on its face** to the area unaffected by the act remaining as "the diminished reservation." **United States ex rel. Condon** v. **Erickson,** 478 F.2d 684 (CA 8 1973). The court termed the decision a "close" question. **Condon, supra,** at 689.

Two months later, in **Mattz, supra,** this Court stressed the importance of legislative history and found that the legislation therein did not terminate or disestablish the Klamath River Reservation. In October, the South Dakota Supreme Court, while citing **Seymour, supra, Mattz, supra,** and the recent Eighth Circuit decisions, nevertheless found that a similar act **did** express a congressional determination to terminate and disestablish a portion of the Yankton Reservation. **State of South Dakota v. Williamson,** 221 N.W. 2d 182 (S.D. 1973). Later in that same month, the court again refused to apply the rationale of **Seymour, supra, Mattz, supra,** and the recent Eighth Circuit decisions to the act in the instant case. However, in December, the Eighth Circuit Court of Appeals, overruling the Federal District Court and effectively overruling the instant case, held that the Lake Traverse Reservation had not been disestablished by the 1891 Act. **Feather, supra.** Again, it was the rationale of **Seymour supra,** and **Mattz, supra,** and the broad application thereof in its own recent decisions that was the deciding factor in the Court of Appeals.

The conflicts and confusion in the above decisions resulted in an extensive review of legislative history by the parties and the court in **Rosebud Sioux Tribe** v. **Kniep et al.** —F.Supp (D.C.S.D., February 6, 1974). In a well written and extensively documented opinion, the Federal District Court for the District of South Dakota, Western Division, in the face of **Seymour, supra, Mattz, supra,** and the recent decisions of the Eighth Circuit, held that the Rosebud Reservation had in fact been diminished by a series of bills enacted over a six-year period. Page after page of congressional documents were quoted in the text of this excellent fifty-page opinion. Immediately thereafter, the Supreme Court of South Dakota held that the Pine Ridge Reservation had also been diminished by an "identical" act. **Cook, supra,** at 5.

If the above acts were distinguishable either on their face or in light of their legislative history, then the conflicts and confusion rampart in the above opinions would be, in part, justifiable. After all, Indian Law is a very complex and difficult area of the law. Realistically, however, this simply is not the case. Someone, somewhere, must take the necessary time and action to clarify what is rapidly becoming something more than a mere conflict within the Eighth Circuit and between the Eighth Circuit Court of Appeals and the South Dakota Supreme Court.

III. THE IMPORTANCE OF THE ISSUE TO BE RESOLVED TO THE STATE OF SOUTH DAKOTA ALONE IS BEYOND QUESTION.

The wholesale application by the Eighth Circuit Court of Appeals of the **Seymour, supra,** and **Mattz, supra,** rationale to each and every piece of reservation legislation that even resembles the acts construed therein has effectively overruled not less than twenty-five state and federal cases decided over a period of fifty years—and this number includes only those cases concerned with South Dakota reservations.[4] In South Dakota alone fourteen counties, in whole or in part, with a total population of approximately 50,000 individuals, have been or in all probability will be, engulfed by the boundaries of reservations heretofore held to have been diminished or extinguished.

It is because of the far-reaching effects of the question to be decided, in addition to the conflicts and confusion discussed at II, supra, that Respondent submits that the question presented should be authoritatively resolved by this Court despite the absence of any real doubt as to the validity of the decision below. Accordingly, Respondent does not oppose the issuance of the writ.

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4. Similar precedent in North Dakota and other states has also been cast aside.

CONCLUSION

It is respectfully submitted that, of the alternatives available to this Court, the issuance of the writ and argument on the merits, would appear to be the most appropriate course.

Respectfully submitted,

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